President Takes Executive Actions Affecting Dodd-Frank and the DOL Fiduciary Duty Rule

On February 3, 2017, President Trump took two executive actions affecting financial regulations. First, he issued an executive order that likely is aimed at the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), directing the Treasury Secretary to review the laws and regulations that govern the U.S. financial system. Second, the President issued a presidential memorandum directing the Department of Labor to review the Fiduciary Duty Rule (the "DOL Rule"), and, if appropriate, take steps to rescind or revise the DOL Rule. This latter presidential memorandum came five days before the United States District Court for the Northern District of Texas granted summary judgment in favor of the DOL in a case challenging the DOL Rule.

These actions, taken within the first few weeks of President Trump's administration, could signal the beginning of a broader reshaping of regulations affecting the United States financial system.

I. The President's Executive Order Affecting Regulation of the U.S. Financial System

President Trump signed an executive order entitled "Core Principles for Regulating the United States Financial System."[1] The order does not mention Dodd-Frank by name but directs the Treasury Secretary to review, within 120 days, the extent to which current financial system regulations promote or inhibit "the Core Principles."[2] The Core Principles are:

- Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
- Prevent taxpayer-funded bailouts;
- Foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
- Enable American companies to be competitive with foreign firms in domestic and foreign markets;
- Advance American interests in international financial regulatory negotiations and meetings;
- Make regulation efficient, effective, and appropriately tailored; and
- Restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

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[1] Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 3, 2017), *available at* https://www.federalregister.gov/documents/2017/02/08/2017-02762/core-principles-for-regulating-the-united-states-financial-system.

[2] The Executive Order is consistent with President Trump's pledge that regulatory changes during his administration "will be close to dismantling of Dodd-Frank." *See* Emily Flitter & Steve Holland, *Trump preparing to dismantle Obama's Wall Street reform law*, REUTERS (May 18, 2016), *available at* http://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y900J.

The mandate to the Treasury Secretary is broad and requires the Secretary to review all "laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and other Government policies" to ensure consistency with the Core Principles. Further, in conducting this review, it requires that the Treasury Secretary consult with the heads of the member agencies of the Financial Stability Oversight Council, which include, among others, the Board of Governors of the Federal Reserve, the Securities and Exchange Commission, and the Commodity Futures Trading Commission. While President Trump stated on February 3, 2017 that he expects his administration "to be cutting a lot out of Dodd-Frank,"[3] there have been no details released yet as to which regulations or parts of Dodd-Frank could be altered as a result of the order. Nevertheless, the order is expansive and gives the Treasury Secretary the authority to review Dodd-Frank and report on any inconsistencies between Dodd-Frank and the President's Core Principles.

Several days after the executive order was signed, House Financial Services Committee Chairman Jeb Hensarling circulated a staff memo announcing changes to his bill to overhaul Dodd-Frank, the Financial CHOICE Act.[4] A central provision of the bill, which was introduced in September 2016, provides large financial institutions with an "off-ramp" from the Dodd-Frank regulatory regime if they agree to substantially increase the amount of capital they hold to withstand shocks.[5] The bill also would repeal the "Volcker Rule" which prohibits banks from trading for their own account. The biggest changes with the bill appear to be centered on the Consumer Financial Protection Bureau ("CFPB"), and would eliminate the bureau's broad mission to police fraud, its consumer complaint database, and its jurisdiction to supervise and demand information from banks.[6] Chairman Hensarling is also reconsidering prior plans to establish a bipartisan commission at the top of the CFPB, proposing instead to have a single director directly under the President's authority.[7] A new version of that bill is expected to be unveiled shortly.

II. The President's Memorandum Affecting the DOL Rule

On the same day as the executive order referred to above, President Trump issued a presidential memorandum directing the Secretary of Labor to review the DOL Rule issued by the Department of Labor in April 2016.[8] The DOL Rule affects financial professionals by expanding the definition of a "fiduciary" and prohibiting certain transactions and compensation arrangements unless an exemption, known as the "Best Interest Contract Exemption," applies. Portions of the DOL Rule are set to apply in stages beginning on April 10, 2017.

President Trump's memorandum to the Secretary of Labor contains three main parts. First, it recites the President's general priority with respect to individual investments and suggests that the DOL Rule may be inconsistent with that priority and the President's policies. Second, it instructs the Department of Labor to review

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[3] Renar Merle and Steven Mufson, *Trump signs order to begin rolling back Wall Street regulations*, WASHINGTON POST (Feb. 3, 2017), *available at* https://www.washingtonpost.com/business/economy/trump-signs-order-to-begin-rolling-back-wall-street-regulations/2017/02/03/650668d8-ea30-11e6-80c2-30e57e57e05d_story.html?utm_term=.b8f1515f90e7.

[4] H.R. 5983, 114th Cong. (2016).

[5] *See* The Financial CHOICE Act Executive Summary at 1, *available at* http://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf.

[6] Doug Sword, *Hensarling's Offensive on Dodd-Frank Seen as Negotiating Move*, ROLLCALL.COM (Feb. 13, 2017), *available at* http://www.rollcall.com/news/policy/hensarlings-offensive-dodd-frank-seen-negotiating-move.

[7] Peter Schroeder, *Chairman Looks to Place Consumer Agency Under Trump's Control*, THEHILL.COM (Feb. 9, 2017), *available at* http://thehill.com/policy/finance/318758-hensarling-looks-to-place-consumer-agency-under-trumps-control.

[8] Document No. 2017-02656, 82 Fed. Reg. 9,675 (Feb. 3, 2017), *available at* https://www.federalregister.gov/documents/2017/02/07/2017-02656/fiduciary-duty-rule.

the DOL Rule in view of the President's priority. Third, it instructs the Department of Labor to develop a plan to revise or rescind the DOL Rule, as appropriate, to align with the President's priority.

In the first part, the memorandum states that one of the priorities of President Trump's administration is "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies." The memorandum states that the DOL Rule "may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of [President Trump's] Administration."

In the second part, the memorandum directs the Department of Labor to review the DOL Rule. According to the memorandum, the review should "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice."[9] Importantly, the memorandum instructs the Department of Labor to "prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule." The memorandum states that this analysis should consider whether the DOL Rule:

- Has harmed or is likely to harm investors due to a reduction of Americans' access to retirement offerings, product structures, savings information, or related financial advice;[10]

- Has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees;[11] and

- Is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.[12]

[9] The presidentially-mandated review of the DOL Rule may be delayed because a Secretary of Labor has yet to be confirmed, as of the date of this memorandum. *See* Eric Morath and Julie Jargon, *Andy Puzder, Donald Trump's Labor Pick, Withdraws*, WALL ST. J. (Feb. 15, 2017), *available at* https://www.wsj.com/articles/andy-puzder-donald-trump-s-labor-pick-withdraws-1487192009?mod=djemalertNEWS.

[10] This has been an area where the DOL Rule has received criticism. *See, e.g.*, State Farm Mutual Automobile Insurance Company, Comment Letter on Conflict of Interest Proposed Rule at 26 (July 21, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00646.pdf (suggesting that the DOL Rule may result in "fewer choices for and less access to retirement services if industry participants exit the business or decline to enter the business in the face of increasing compliance costs and regulatory risks. Lack of access could lead to harmful under-saving and greater reliance by these individuals on already strained public safety nets.").

[11] For example, as a result of the DOL Rule, a number of significant industry leaders, including Merrill Lynch and Commonwealth Financial Network, have announced they will no longer offer commission-based products in IRAs and qualified retirement plans. *See* Fiduciary Focus, *Commonwealth Financial eliminates commission-based retirement products in wake of DOL rule*, INVESTMENT NEWS (Oct. 24, 2016), *available at* http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement.

[12] In its challenge to the DOL Rule, the U.S. Chamber of Commerce argued that "class action lawsuits . . . will proliferate" under the Best Interest Contract Exemption of the DOL Rule and that the litigation costs "will be borne by the defendants in those actions and by consumers who pay higher prices." *See Chamber of Commerce* v. *Hugler*, No. 3:16-cv-01476-M, Doc. No. 52 at 35 (N.D. Tex. July 18, 2016).

In the third part, the memorandum states that if the Department of Labor makes an "affirmative determination" as to any of the considerations listed above or if the Department of Labor determines for any other reason that the DOL Rule is inconsistent with the President's priority listed above, then the Department of Labor "shall publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law."

After the President issued his memorandum, Edward Hugler, the Acting Secretary of Labor, stated that "[t]he Department of Labor will now consider its legal options to delay the applicability date" of the DOL Rule.[13]

While the Department of Labor reviews the DOL Rule, several legal challenges to the DOL Rule are proceeding in federal courts. On November 14, 2016, the National Association for Fixed Annuities appealed to the D.C. Circuit from a district court order upholding the DOL Rule.[14] On December 29, 2016, plaintiff Market Synergy Group, Inc. filed a motion for summary judgment in the United States District Court for the District of Kansas challenging the DOL Rule.[15] And on February 8, 2017, the United States District Court for the Northern District of Texas granted summary judgment for the Department of Labor upholding the DOL Rule.[16] The district court entered this order despite a motion by the Department of Labor to stay the proceedings in view of President Trump's February 3, 2017 memorandum to the Secretary of Labor, which supports speculation that the current administration may not defend the DOL Rule.[17]

III. Conclusion

President Trump's executive actions have the potential to reshape financial regulations. The executive actions require reviews of financial regulations in view of President Trump's priorities, and the results of those reviews are likely to result in significant changes.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly C. Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Glenn Waldrip at 212.701.3110 or gwaldrip@cahill.com; Sara Ortiz at 212.701.3368 or sortiz@cahill.com; or Michael Wheatley at 202.862.8932 or mwheatley@cahill.com.

[13] U.S. Department of Labor, *US Department of Labor to Evaluate Fiduciary Rule* (Feb. 3, 2017), *available at* https://www.dol.gov/newsroom/releases/opa/opa20170203.

[14] *See Nat'l Assoc. for Fixed Annuities* v. *Dep't of Labor*, No. 16-5345, Doc. No. 1656158 (D.C. Cir. Jan. 17, 2017).

[15] *See Market Synergy Grp., Inc.* v. *Dep't of Labor*, No. 5:16-cv-04083-DDC-KGS, Doc. Nos. 65 and 66 (D. Kan. Dec. 29, 2016).

[16] *See Chamber of Commerce* v. *Hugler*, No. 3:16-cv-01476-M, Doc. No. 137 (N.D. Tex. Feb. 8, 2017).

[17] *See Chamber of Commerce* v. *Hugler*, No. 3:16-cv-01476-M, Doc. No. 136 (N.D. Tex. Feb. 8, 2017).